Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Time Warner Cable's	)	
Petition for Declaratory Ruling that	)	
Competitive Local Exchange Carriers	)	WC Docket No. 06-55
May Obtain Interconnection Under Section	)	
251 of the Communications Act of 1934,	)	
as Amended, to Provide Wholesale	)	
Telecommunications Services to VoIP	)	
Providers	)	

JOINT REPLY COMMENTS OF BRIDGECOM INTERNATIONAL, INC., BROADVIEW NETWORKS, INC., CTC COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, XSPEDIUS COMMUNICATIONS, LLC, AND COMPTEL

Brad E. Mutschelknaus
Harry M. Davidow
Edward A. Yorkgitis, Jr.
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600 (phone)
(202) 955-9792 (fax)

Dated: April 25, 2006

* Not admitted in D.C. Practice limited to matters and proceedings before federal courts and agencies.

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SUMMARY

Time Warner Cable's Petition for Declaratory Ruling has broad industry support. Only a handful of rural incumbent local exchange carriers, desperately attempting to cling to the last vestiges of a by-gone monopoly era, have filed in opposition. Those few opposing comments attempt to distract the Commission from the fundamental issue raised in Time Warner Cable's Petition: that CLECs are entitled to interconnection with ILECs pursuant to Section 251(c) of the Act, regardless of the identity or classification of the customers they serve. The rural ILEC arguments regarding whether VoIP providers or other CLEC customers are "telecommunications carriers" or "information service" providers are simply "red herrings." Similarly, issues concerning whether VoIP providers fall within the ambit of Section 251(b) of the Act, and if so, what rights and obligations they may have with respect to reciprocal compensation and number portability, need not be decided as a prerequisite to the Commission deciding the issue of ILEC-CLEC interconnection under Section 251. The Time Warner Cable Petition has broad implications for all CLECs seeking to provide wholesale service. In order to avoid further anticompetitive actions by rural ILECs and state commissions, the Commission must address Time Warner Cable's Petition in a timely manner and reaffirm that CLECs are entitled to interconnect with ILECs in order to transmit and route traffic of the customers they serve with telecommunications traffic, whether the customers are wholesale or retail.

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BridgeCom International, Inc., Broadview Networks, Inc., CTC Communications Corp., NuVox Communications, Xspedius Communications, LLC, and COMPTEL, on behalf of its member companies[1] (collectively, the "Joint Commenters"), through undersigned counsel, hereby reply to the comments filed with the Federal Communications Commission ("FCC" or "Commission") in the above-captioned docket in response to Time Warner Cable's ("TWC") Petition for Declaratory Ruling.[2]

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1 COMPTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTEL advances its members' business through policy advocacy and through education, networking and trade shows. COMPTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTEL members share a common objective: advancing communications through innovation and open networks.

2 *Time Warner Cable Petition for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, filed Mar. 1, 2006 ("*TWC Petition*").

I. INTRODUCTION

Seldom has a Petition for Declaratory Ruling relating to interconnection rights under the Communications Act of 1934, as amended ("the Act"), ever garnered such broad-scale industry support as the petition at issue here. Carriers across the entire telecommunications spectrum -- competitive local exchange carriers ("CLECs"),[3] cable companies,[4] the major incumbent local exchange carriers ("ILECs"),[5] and others[6] -- all have filed comments in support of TWC's Petition. By contrast, only a handful of rural incumbent local exchange carriers ("rural ILECs"), desperately attempting to cling to the last vestiges of a by-gone monopoly era, have filed in opposition. Upon a fair reading of those few dissenting comments, it becomes clear that their sole aim is to distract the Commission from the fundamental issue raised in TWC's Petition: that CLECs are entitled to interconnection with ILECs pursuant to Section 251(c) of the Act, regardless of the identity or classification of the customers they serve. The rural ILEC arguments regarding whether VoIP providers or other CLEC customers are "telecommunications carriers" or "information service" providers are simply irrelevant "red herrings." Similarly, issues concerning whether VoIP providers fall within the ambit of Section 251(b) of the Act, and if so, what rights and obligations they may have with respect to reciprocal compensation and number portability, need not be decided as a prerequisite to the Commission deciding the issue of ILEC-CLEC interconnection raised in TWC's Petition. Other issues, such as whether a VoIP provider has the right to directly interconnect under Section 251(a) or 251(c) are not raised by

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3 *E.g.,* Level 3, Broadwing Communications, Fibertech Networks, Integra Telecom, Lightyear Communications, McLeod Telecommunications Services, Mpower Communications, Norlight Telecommunications, Pac-West Telecom, Alpheus Communications, PaeTec Communications, and US Telepacific.

4 *E.g.,* Comcast, Advance-Newhouse Communications, the National Cable & Telecommunications Association, and the South Carolina Cable Television Association.

5 AT&T and Verizon.

6 *E.g.,* the Voice on the Net ("VON") Coalition.

the TWC Petition. That the rural ILECs have attempted to engage in such sleight-of-hand underscores that they cannot escape the fact that Section 251(c) of the Act entitles CLECs to interconnection regardless of whether they serve end-user customers, interexchange carriers, other LECs, or VoIP providers. Indeed, despite the rural ILEC rhetoric and their attempts to obfuscate, clear and unambiguous Commission and court precedent supports CLECs' right to interconnect under Section 251(c)(2).

The TWC Petition has broad implications for all CLECs seeking to provide wholesale service, whether to other LECs, interexchange carriers, VoIP providers, or otherwise. The petition raises serious issues concerning basic CLEC entitlements to interconnection that go beyond the narrow question of the regulatory classification and the attendant rights and obligations of VoIP providers. Moreover, the rural ILECs and the few Commissions that support them can do significant harm to competition and to consumers – including the rural consumers who are potentially the most deprived of the benefits of the new technologies, such as VoIP, unless the Commission rules favorably on the TWC Petition.

The Commission must, therefore, address the petition rather than defer its resolution, as any delay of this matter would send the wrong message to rural ILECs and state commissions and allow those entities to make further anticompetitive mischief with CLECs' rights under Sections 251(a) and (c) of the Act.

II. DISCUSSION

A. RURAL ILEC COMMENTERS SEEK TO DISTRACT THE COMMISSION FROM THE FUNDAMENTAL ISSUE RAISED BY TWC'S PETITION – THAT CLECS ARE ENTITLED TO INTERCONNECTION WITH ILECS PURSUANT TO SECTION 251(C), REGARDLESS OF THE IDENTITY OR CLASSIFICATION OF THE CUSTOMERS THEY SERVE

As a variety of commenters correctly note, the rural ILECs' initial comments improperly focus on the regulatory classification of the interconnecting CLEC's customer, rather

than on whether the CLEC itself is providing "telecommunications service." Arguments proffered by the rural ILECs regarding whether VoIP providers or other customers are "telecommunications carriers" or "information service" providers are simply "red herrings" and are not relevant here.[7] As the overwhelming majority of commenters demonstrated in their initial comments, including AT&T, Verizon and a host of others, the Commission and the courts have repeatedly held that the definition of "telecommunications service" includes wholesale service and that carriers cannot be denied interconnection, regardless of the nature of their customers.[8] Indeed, the Commission itself has recently explained in its *Triennial Review Order* that "[c]ommon carrier services may be offered on a retail or wholesale basis because common carrier status turns not on *who* the carrier serves, but on *how* the carrier serves its customers, *i.e.*, indifferently and to all potential users."[9]

The Act's definition of "telecommunications carrier" does not contain any references to the type of customer that must be served when determining whether a company should be classified as a "telecommunications carrier."[10] As the Joint Commenters explained previously, a carrier's provision of "telecommunications services" to other carriers or service providers is generally sufficient to qualify it as a "telecommunications carrier."[11] Even the

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7 *See e.g.,* Comments of the South Carolina Telephone Coalition ("SCTC") at 8-9; Comments of John Staurulakis at 10; Comments of the South Dakota Telecommunications Association ("SDTA") at 7.

8 Comments of AT&T at 2-3; Comments of Verizon at 8 ("regardless of how such a wholesale service is classified, a competitive LEC has the right to provide that service under. . .Section 251). *See also, e.g.,* Comments of Global Crossing at 2; Comments of Sprint Nextel at 22-24; Comments of Level 3 at 8; Comments of the VON Coalition at 2; Comments Alpheus *et al.* at 10; Comments of Broadwing *et al.* at 14; Comments of BridgeCom *et al.* at 7-9.

9 *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶153 (2003) (emphasis in the original).

10 *See* 47 U.S.C. §153(44). *See also, e.g.,* Comments of Alpheus *et al.* at 10-11; Broadwing *et al.* at 14-15; Global Crossing at 2; BridgeCom et al. at 5-6, 11-12; Level 3 at 8; Sprint Nextel at 22-24; VON Coalition at 2.

11 Comments of BridgeCom *et al.* at 7-9.

Nebraska Public Service Commission ("Nebraska PSC"), whose order permitted rural ILECs to refuse to interconnect with wholesale service providers and is the subject of TWC's Petition, does not dispute this issue. The Nebraska PSC stated, "[t]he NPSC has never held that wholesale telecommunications service providers could not obtain interconnection. Rather, the NPSC acknowledged that service can be offered indirectly by telecommunications carriers."[12] Accordingly, the proper focus -- and the real question here -- is simply whether CLECs are "telecommunications carriers" under Section 251 of the Act. Clearly, the answer to that question is "yes." The identity and the regulatory classification of a CLEC's customer simply are not germane to whether a CLEC is entitled to interconnection under Section 251.

This result, of course, is the correct one from a policy standpoint as well. Broadly construing a carrier's right to interconnect, especially by making the nature of its customers, whether retail or wholesale, irrelevant to the inquiry, promotes customer choice and competition from a variety of service providers, including not just traditional CLECs, but VoIP providers, mobile service providers, and others. In contrast, the position of the Nebraska and South Carolina commissions seem to be the opposite: carriers offering new competitive choices are looked upon suspiciously and the presumption is that they may not be allowed to compete unless they prove otherwise. There is, in fact, no evidence at all that either MCI or Sprint had committed to offering services exclusively to one customer. If, as both firms attest, they are prepared to offer service indifferently to the retail provisioning public, they should clearly qualify for certification and interconnection with the rural incumbents.

Consequently, based on the legal analysis of the issues raised by the Joint Commenters in their initial comments and the record summarized above, the rural ILEC

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12 Comments of the Nebraska PSC at 10.

arguments regarding VoIP providers' rights and obligations under Section 251(b), including reciprocal compensation and number portability, are likewise irrelevant to the core issue of ILEC-CLEC interconnection. Intercarrier compensation in cases where a CLEC serves a customer whose regulatory status may be uncertain are rightfully addressed in ILEC-CLEC state interconnection agreement negotiations/arbitrations or other proceedings before this Commission, such as the pending *IP-Enabled Services* proceeding. However, state commissions must correctly address the fundamental issue of CLEC-ILEC interconnection. To wit: a CLEC's entitlement to interconnection (whether a carrier is a "telecommunications carrier") does *not* turn on the identity or classification of the customer that the CLEC serves or the carrier with which the CLEC interconnects. Rural ILECs' cries that the sky is somehow falling because they are uncertain as to how VoIP traffic should be compensated have nothing to do with whether CLECs are entitled to Section 251 interconnection in the first instance.[13] Thus, the Commission should issue the requested declaratory ruling to remove any uncertainty that exists surrounding this central issue and the prospect of additional contrary state rulings.

Even aside from the lack of a direct nexus between ILEC-CLEC interconnection obligations under Section 251 and the treatment of intercarrier compensation for VoIP traffic, the telecommunications industry has been adequately coping with the regulatory uncertainty surrounding compensation for VoIP traffic, based, in part, on lessons learned prior to this Commission's decisions resolving the status of ISP-bound traffic. Carriers negotiating interconnection agreements during that time period routinely inserted reservation clauses, change-of-law language, and true-up provisions in those agreements, allowing the parties to continue to exchange and provide compensation for ISP-bound traffic until the Commission and

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13 *See e.g.,* Comments of Neutral Tandem at 12-14.

the courts conclusively resolved the matter. The same is true for VoIP traffic today. Many ILEC interconnection agreements in place today provide for such contingencies by including reservation clauses, change-of-law language, and true-up provisions relating to VoIP traffic, all of which work to balance any financial harm that may result to one party as a result of a change-of-law associated with compensation for VoIP traffic. For example as Qwest points out, if an interconnecting CLEC's customer is an enhanced service provider ("ESP"), then the appropriate intercarrier compensation is reciprocal compensation exchanged between the CLEC and ILEC, and where that customer is a carrier, then the appropriate compensation is transiting service.[14] Thus, until the Commission resolves extraneous issues such as intercarrier compensation for VoIP traffic and number portability in other proceedings, such as the *IP-Enabled Services* proceeding, "if-then" contingencies like those described by Qwest are available to interconnecting parties. Any such regulatory certainty does not stand in the way of properly treating CLEC requests for interconnection under Sections 251(a) and 251(c)(2).

Regarding a CLEC's right to act as a transiting carrier, John Staurulakis erroneously claims *inter alia* that nothing requires rural ILECs to interconnect with third-party or intermediary carriers.[15] Similarly, the South Carolina Telephone Coalition ("SCTC") takes the position that interconnection, as contemplated in Section 251, is limited to a bilateral agreement between two carriers, each serving end user customers within the same local calling area.[16] As other commenters make clear, however, there is no support for those positions in either the Act or the Commission's rules. Indeed, quite the opposite is true. As Neutral Tandem notes, for

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14 Comments of Qwest at 5.

15 *See e.g.*, Comments of John Staurulakis at 10.

16 Comments of SCTC at 8. SCTC adds that, in the MCI/TWC situation, "MCI merely proposed to act as an intermediary -- a connection" -- between two facilities-based carriers." *Id.* at 11.

example, Section 251 permits CLECs to provide a transiting function for its customers and thereby facilitate the indirect exchange of traffic.[17] And the Commission, in its 1994 *Tandem Switching Order*, specifically recognized that carriers *other than ILECs* may provide transiting services, resulting in "increase[d] access to diverse facilities, which could improve network reliability."[18] Furthermore, the Commission recognized in its *Intercarrier Compensation FNPRM* that *transiting service is an increasingly critical form of interconnection* and sought comment on how best to encourage the provision of transit services by carriers other than ILECs.[19] Thus, as AT&T points out, the South Carolina and Nebraska commission decisions which spurred TWC's petition "are premised on the misguided notion that. . .transit service providers do not provide telecommunications services. . . and are not entitled under the Act to interconnect with other carriers."[20] Arguments to the contrary are simply unavailing and would unjustifiably limit the scope of Section 251(a) and (c)(2).

Additionally, several of the rural ILECs imply that CLECs that do not provide what they refer to as "traditional" wholesale services are not really wholesalers at all. For instance, SCTC states that "it is clear that MCI does not intend to provide wholesale services *in the traditional sense* pursuant to Act, *i.e.,* for resale by Time Warner pursuant to Sections 251(b)(1) or (c)(4)."[21] SCTC fundamentally misapprehends the distinction between wholesale and resale. The interconnection rights of a telecommunications carrier when it provides

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17 *See e.g.,* Comments of Neutral Tandem at 9 ("Section 251. . . authorizes all carriers to obtain interconnection to serve third-party providers, and to send third-party traffic to ILECs").

18 *Id.* at 3, *quoting Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II*, 9 FCC Rcd. 2718, ¶2 (rel. May 27, 1994).

19 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of proposed Rulemaking, CC Docket No. 01-92, FCC 05-33 (rel. Mar. 3, 2005) at ¶125 ("*Intercarrier Compensation FNPRM*") (emphasis added).

20 Comments of AT&T at 3.

21 Comments of SCTC at 11 (emphasis added). *See also*, Comments of South Dakota Telecommunications Association ("SDTA") at 10.

wholesale services are not limited to where it provides services that may be resold as a "finished" product to end-user or carrier customers. A carrier is equally entitled to interconnection when it provides the "piece parts" that are incorporated into another provider's end-user services (*e.g.*, exchange access services). As the South Carolina Cable Television Association makes clear, for example, CLECs have the right to provide the telecommunications input necessary to enable a VoIP provider to offer a finished information service.[22] Again, the positions taken by SDTA and SCTC unjustifiably limit CLECs' rights under Section 251 of the Act – and thereby directly harm consumers -- and therefore must be rejected.

Lastly, the Iowa Rural LECs maintain that a carrier's decision to memorialize its service offering in a contract vitiates that carrier's status as a common carrier entitled to interconnection.[23] In fact, it is standard industry practice for carriers to provide telecommunication services to their retail enterprise and wholesale carrier customers by contract.[24] The courts have never found that serving customers through contracts inherently or presumptively disqualifies a carrier as a "telecommunications carrier" entitled to interconnection, contrary to the Iowa RLEC Group's categorical assertion that "what makes a carrier service 'common' is that the customer can simply elect to choose the service based on generally available public displayed rates, terms and conditions of service."[25] Indeed, the Iowa RLEC Group's self-serving statement is unsupported by any analysis of the precedent addressing the definition of "common carriage," as evidenced by the conspicuous absence of even a single

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22 Comments of the South Carolina Cable Television Association at 8.

23 *E.g.*, Comments of the Iowa RLEC Group at 4; *cf.* Comments of Alpheus *et al.* at 8; Comments of Global Crossing at 4; Comments of Level 3 at 7; Comments of Sprint Nextel at 16; Comments of BridgeCom *et al.* at 9-11.

24 *See e.g.*, Comments of Global Crossing at 4; Comments of Level 3 at 7. *See also*, Comments of BridgeCom *et al.* at 9-11.

25 Comments of Iowa RLEC Group at 4.

footnote in its five-page filing. Thus, as long as a CLEC makes available or offers to make available similar services to similarly situated customers, it qualifies as a "telecommunications carrier" and is entitled to interconnection pursuant to Section 251(c)(2) of the Act.

B. THE COMMISSION SHOULD NOT DEFER RESOLUTION OF TWC'S PETITION TO ITS *IP-ENABLED SERVICES* PROCEEDING

The TWC Petition involves a question fundamentally different than the regulatory classification and rights and obligations of VoIP providers on which so much of the opposition focuses. The issue under Section 251 is whether the ILEC must interconnect with the carrier seeking interconnection, not the customer of the carrier. As such, the prompt and clear grant of the petition will create significant benefit for all CLECs intending to provide wholesale telecommunications service, whether to other LECs, interexchange carriers, VoIP providers, mobile carriers, or others. Deferring resolution of the TWC Petition until the resolution of other Commission proceedings dealing with the questions of how to treat VoIP traffic, as some of the rural ILECs request,[26] will send the wrong message to state commissions regarding CLECs' basic entitlements to interconnection under Sections 251(a) and (c) and encourage the intransigence of rural ILECs.

Furthermore, ruling on the TWC Petition separately, and limited to the issues raised in the petition, would not be an instance of piecemeal rulemaking, as Home Telephone argues.[27] Rather, the relief TWC seeks would promote a competitive marketplace as CLECs allow alternative providers to enter the marketplace quickly, as Sprint Nextel notes.[28] Moreover,

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26 Comments of Qwest at 7-8; Comments of Home Telephone and PBT at 3; Comments of Independent Telephone and Telecommunications Alliance *et al.* at 12.

27 Comments of Home Telephone at 3.

28 Comments of Sprint Nextel at 3.

grant of the TWC Petition is not an instance of rulemaking at all, as the Commission is being asked to interpret the existing law.

Finally, granting the relief which TWC requests would not prejudge the pending Grande or VarTec petitions for declaratory ruling, as SCTC claims,[29] because neither of those petitions involves the fundamental question of the rights of carriers to interconnect with ILECs under Section 251(a) and (c)(2). Rather, those proceedings deal with issues surrounding the treatment of traffic for intercarrier compensation purposes that are exchanged through Section 251(a) and 251(c)(2) interconnections. While resolution of certain key regulatory issues regarding the treatment of VoIP traffic and providers in other appropriate *fora* would be welcome, basic interconnection rights -- including the rights to exchange traffic -- should not be denied while those other, ancillary regulatory issues are pending resolution.

III. CONCLUSION

In light of the foregoing, the Joint Commenters request that the Commission grant, in its entirety, TWC's Petition for Declaratory Ruling by reaffirming that Sections 251(c)(2) and 251(a) of the Act, as interpreted by applicable Commission and court precedent, entitle CLECs to interconnect with ILECs in order to transmit and route traffic of the customers they serve with telecommunications traffic, whether the customers are wholesale or retail.

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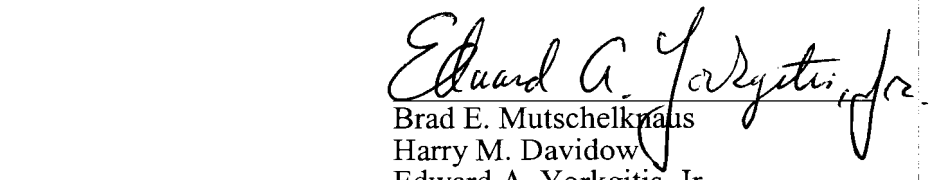
29 Comments of SCTC at 15. *See, Petition for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Co. or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Co. or Other Local Exchange Carriers for Termination*, WC Docket No. 05-276, filed Aug. 20, 2004. *See also, Petition of Grande Communications, Inc. for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic*, WC Docket No. 05-283, filed Oct. 3, 2005.

Respectfully submitted,



Brad E. Mutschelknaus
Harry M. Davidow
Edward A. Yorkgitis, Jr.
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600 (phone)
(202) 955-9792 (fax)

Dated: April 25, 2006

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